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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE DIAZ et al., Defendants and Appellants.	B203452 (Los Angeles County Super. Ct. No. LA049969)

APPEALS from judgments of the Superior Court of Los Angeles County, Darlene E. Schempp, Judge. Affirmed as modified with directions.

Leslie Conrad, under appointment by the Court of Appeal and the California Appellate Project, for Defendant and Appellant Enrique Diaz.

Lawrence R. Young & Associates, P.C., and Lawrence R. Young, for Defendant and Appellant Luis Vega.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Stephanie C. Brenan, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Enrique Diaz and Luis Vega appeal their conviction and sentencing for second degree murder and misdemeanor battery. Diaz contends the trial court erred in (1) failing to instruct sua sponte on the defense of withdrawal from participation in a crime and (2) denying a defense motion for new trial based on newly discovered evidence. Diaz further contends that the state court construction penalty and DNA penalty were erroneously calculated. Vega contends that (1) substantial evidence does not support his conviction for aiding and abetting second degree murder, as the offense was not a reasonable and probable consequence of assault, battery or breach of the peace; (2) there was insufficient evidence corroborating the adverse testimony of an accomplice; and (3) the prosecutor misled the jury concerning the sufficiency of the corroborative evidence. Respondent concedes the state court construction and DNA penalties were wrongly assessed and should be stricken. We modify the judgments to delete the improperly assessed penalties and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellants were charged by information with murder (Pen. Code, § 187, subd. (a), count 1) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1), count 2) following the shooting death of Samuel Salas and the beating of Carlos Juan Pedroza.[1] The information alleged that both counts had been committed for the benefit of, at the direction of and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members.

The information further alleged with respect to count 1, that a principal (1) personally and intentionally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivision (d) and (e)(1); (2) personally and

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[1] Unless otherwise specified, statutory references are to the Penal Code.

intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c) and (e)(1); and (3) personally used a firearm within the meaning of section 12022.53, subdivision (b) and (e)(1). Appellant Vega was alleged to have suffered two previous convictions -- one for assault by means of force likely to produce great bodily injury and one for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

B. *Evidence at Trial*

1. *Prosecution Evidence*

On August 13, 2005, at approximately 11:00 p.m., Salas was beaten and shot and Pedroza was beaten in an alley located between Tiara and Oxnard Streets, an area claimed by the North Hollywood Boyz (NHB) gang. Appellants were members of NHB.[2]

Approximately four months before the shooting, Pedroza's brother Victor was assaulted by NHB member Roberto "Clumsy" Fletes.[3] Fletes accused Victor of selling drugs in NHB gang territory and demanded payment of $300. Eleven days prior to the assault on Salas and Pedroza, Victor testified at a hearing at which Fletes was found in violation of parole.

A week prior to the shooting, Pedroza walked into a liquor store and saw Vega.[4] Vega said: "There is the rat." On the day of the shooting, a party was taking place in the yard of an apartment building that backed onto the alley. The hostess was Vega's

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[2] Diaz disputed that he was an active member of NHB at the time of the shooting. However, there are no issues pertaining to the gang allegations raised on appeal.

[3] Victor Pedroza is referred to by his first name to distinguish him from his brother.

[4] Pedroza knew Vega by his nickname "Wicked." Pedroza had been acquainted with Vega for more than ten years.

aunt. Victor drove by the party and saw Diaz standing outside. Diaz had his right hand inside his jacket pocket and made a "crazy" face at Victor.

Later that night, Pedroza, who as a child had suffered injuries in an automobile accident that paralyzed his left arm and caused him to walk with a limp, was with his 15-year old friend, Salas. Shortly before 11:00 p.m., they decided to go to the party, and began walking down the alley to get there. As they approached the gate to the yard where the party was being held, they were confronted by Marcos Betancourt.[5] Betancourt asked Pedroza: "[Y]ou know where you're at?" Pedroza said he did and kept walking.

Pedroza and Salas attempted to enter the yard, but were stopped by Diaz, who was standing by the gate. Diaz said: "Is this the rat?"[6] Pedroza denied the accusation. Betancourt said: "Let's fuck this fool." Diaz said: "Nah. Just leave him alone." Pedroza noticed Vega inside the yard, talking to the deejay. Pedroza decided to leave.

As Pedroza and Salas were walking down the alley away from the party, they were attacked from behind by four men, including Vega and Betancourt.[7] The men hit both Pedroza and Salas with their fists. Pedroza did not try to defend himself because of his physical condition and because he believed the men intended to let them go after administering a beating. Salas, however, tried to stop the men from beating Pedroza. Diaz, who had been standing by the gate watching the attack, hurried closer and extended his arm toward Pedroza and Salas. Pedroza did not see a weapon, but he heard a shot. Salas fell to the ground, bleeding. The group of men, including Diaz, ran away.

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[5] Pedroza knew Betancourt by his nickname, "Shyster." Pedroza also called Betancourt "Little Bam-Bam," but that had been Betancourt's brother's nickname.

[6] Pedroza knew Diaz by his nickname "Serio." Pedroza had been acquainted with Diaz for approximately ten years.

[7] Pedroza did not recognize the other two men.

Immediately after the shooting, Pedroza said to a female partygoer who was trying to comfort him: "It was the fat boy" or "fat man," referring to Diaz. However, when initially interviewed by the police, Pedroza did not truthfully state what had happened because he was afraid of retaliation.[8] When first interviewed by investigators, he denied having seen the shooter or where the shot came from. He was shown a photo pack containing a photograph of Vega and identified him only as a man he had seen at the party, standing near the deejay. Pedroza identified a photograph of Diaz as a man he had seen standing outside the party. The only one of the attackers he attempted to identify from the beginning was Betancourt. But he did not give investigators Betancourt's name or identify his photograph; instead, he assisted a police artist in drawing a composite sketch bearing Betancourt's features. After the authorities assisted Pedroza and his family in finding a place to live outside the neighborhood, Pedroza provided information about Diaz and Vega's roles in the attack.

Marcos Betancourt, 14 years old at the time of the incident, testified for the prosecution.[9] He had entered into a plea agreement under which in exchange for truthful testimony and pleading guilty to a charge of aiding and abetting willful, premeditated, deliberate murder for the benefit of, at the direction of and in association with a criminal street gang, he was charged and sentenced as a juvenile offender.

At the time of the shooting, Betancourt was a member of NHB. He met fellow gang members Diaz and Vega several months before the incident. Prior to the shooting, Betancourt was with Vega when Vega heard that "Clumsy" Fletes had been jailed. Vega said he was going to get the person who "snitched." Vega described the person who had testified against Fletes as handicapped or "crippled."

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[8] Pedroza was interviewed three times -- on August 14, 15 and 25, 2005.

[9] Because Betancourt's testimony differed from Pedroza's in several respects, it is summarized separately.

On the night of the shooting, Betancourt drove to the party with fellow gang member Joe "Little Giant" Popolo. When they arrived, Vega was already there. Vega showed Betancourt a gun and said he had armed himself because there were members of a rival gang at the party. Vega introduced Betancourt to his girlfriend's sister. While Betancourt was talking to the girl, Diaz called for him. Diaz asked Betancourt if he recognized two men -- Pedroza and Salas -- who were walking down the alley. Betancourt said he did not. Diaz told Betancourt to "hit [them] up."[10] Betancourt approached Pedroza and asked where he was from. Pedroza said he "didn't bang." Betancourt asked Pedroza if he knew where he was. Pedroza said: "Yes." Betancourt walked back toward Diaz, who said: "That's the guy that ratted on Clumsy." Pedroza denied the accusation, but Diaz said: "You are the guy that did it." Betancourt hit Pedroza. Vega came up and said: "Let me get some." Betancourt told Diaz and Vega to "leave them alone," and went back inside.

When Betancourt returned to the alley a few minutes later, Vega was "stomping" Pedroza, who was lying on the ground. Other people were in the alley -- gang members Diaz, "Little Giant" Popolo and "Solo," two girl called "Giggles" and "Morena," and a person known as "Trouble" -- but Betancourt did not see anyone participating in the beating except Vega. Salas attempted to help Pedroza. Diaz blocked Salas and Salas said: "Get the fuck out of my way." Diaz drew a gun from his pocket and shot Salas, holding the gun a few inches away from Salas's head. When the gun fired, Diaz said: "Oh shit."[11]

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[10] "Hit him up" means to issue a challenge or ask someone where he is "from." "Where are you from?" is a question intended to solicit information concerning which gang another person is associated with.

[11] Betancourt believed he had seen the gun or one similar to it at another gang member's house several months prior to the shooting.

After the incident, Vega and other NHB gang members told Betancourt that he should take the blame or he and his family would be killed. Betancourt left town that night, eventually travelling to Mexico, where he stayed for a year. When he returned, Betancourt initially told authorities that Vega had not been in the alley and that a different gang member -- "Little Giant" Popolo -- had beaten Pedroza. Betancourt also initially said that the gun went off as Diaz was hitting Salas with it.

The autopsy showed that Salas had suffered a gunshot to the head. The bullet entered just above his left ear and stopped above his right ear. The path was slightly upward. There was no soot or stippling near the entry wound, indicating that the gun had been held more than 18 inches from the victim's head when fired. Salas also had a lacerated spleen, internal bleeding, lacerations and bruises on his head and arms, and a black eye. After the beating, Pedroza had marks or bruises on various parts of his body, a swollen face and a bloody nose.

Investigators discovered that Diaz's cell phone had the name "Clumsy" (Fletes) on speed dial, as well as "Wicked" (Vega). Vega's cell phone records showed that he had called Fletes shortly before the shooting. Vega called Diaz multiple times afterward.

Gang expert, Officer Gary Pugliese, testified that it is part of gang culture to use violence to prevent witnesses to gang crimes from coming forward and testifying against members. If intimidating the witness does not work, gangs will resort to violence. It is important to gang culture to make an example of people who testify against gang members. Gang members are also violent toward people who "disrespect" them. They have to set an example or else lose their hold on the community around them. Intimidating ordinary citizens and potential witnesses helps them control territory and commit crimes within the territory with impunity. If an informant or a member of the family of an informant is found in gang territory, there is a "good possibility" that that person would be assaulted and it is within the "realm of probability" that the attack

will lead to a shooting. When someone intervenes in a gang attack, violence will escalate. Attempting to intervene is considered a form of disrespect. Gang fights sometimes lead to shootings.

Officer Pugliese further explained that asking someone where he is "from" represents a challenge. Depending on the answer, the outcome could be a fight or a shooting, though if the challenged person answers "I don't bang" that could be the end of it. Gangs frequently post sentries when a number of members are at a location and, in Officer Pugliese's opinion, a person standing by a gate overlooking an alley outside a party was acting as a sentry.[12]

2. *Defense Evidence*

The defense pathologist testified that given the trajectory of the bullet, Salas's height, and the evidence that Salas was standing upright when he was shot, it was unlikely that someone of Diaz's height fired the gun that shot Salas.[13]

The defense gang expert testified that younger, newer gang members often initiate criminal activities or assaults to enhance their reputations and impress other members. He did not believe that gang members generally refer to a family member of someone who informed as a "rat." However, he agreed that if a gang member pointed out a "rat," an assault is a likely result. The assault could escalate to a shooting, if a gun were available.

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[12] Officer Pugliese expressed the opinion that the crime in the case was committed to benefit, promote or assist criminal conduct by a gang member and testified to a number of other matters pertinent to establishing the gang allegations. As there is no issue on appeal concerning the gang allegations, we do not summarize that testimony.

[13] Salas was 5 feet 10 inches tall. Diaz is between 6 feet 1 inch and 6 feet 2 inches.

Diaz's wife, Shawna, testified that she and Diaz had moved away from the neighborhood, that he was working fulltime and caring for their children after work, and that his gang tattoos were all a decade old.

C. *Relevant Instructions and Argument*

The court instructed the jury pursuant to CALJIC No. 3.02 as follows: "One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, but is also guilty of any other crime committed by a principal[] which is a natural and probable consequence of the crimes originally aided and abetted. . . . In order to find the defendant guilty of the crime of murder as charged in count 1, you must be satisfied beyond a reasonable doubt that: [¶] 1. the crime of assault, battery, breach of the peace was committed; [¶] 2. that the defendant aided and abetted that crime; [¶] 3. that a co-principal in that crime committed the crime of murder; and [¶] 4. the crime of murder was a natural and probable consequence of the commission of the crimes of assault, battery, breach of the peace. [¶] In determining whether a consequence is natural and probable, you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual had intervened. 'Probable' means likely to happen."

The court instructed the jury pursuant to CALJIC No. 3.01 as follows: "A person aids and abets the commission or attempted commission of a crime when he: [¶] (1) with knowledge of the unlawful purpose of the perpetrator, and [¶] (2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) by act or advice aids, promotes, encourages or instigates the commission of the crime . . . .[¶] Mere presence at the scene of a crime which does not itself assist the

commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

The court instructed the jury pursuant to CALJIC No. 3.11 as follows: "You cannot find a defendant guilty based upon the testimony of an accomplice that incriminates the defendant unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense."

In closing argument, the prosecutor initially argued that Diaz was the shooter and Vega an aider and abettor.[14] The prosecutor argued Salas's homicide was the natural and probable consequence of the assault and that "[i]n a gang context . . . , when you start beating somebody, the probable consequence is a shooting." During rebuttal argument, noting that the defense had suggested someone else could have been the shooter, the prosecutor stated: "If you accept the defense argument that someone else is the shooter . . . , then guess what, this killing does not happen without Diaz. . . . He's the one who sics Betancourt on Salas and Pedroza . . . . He's the one who announces in the alleyway, 'This is the fool that ratted on Clumsy.' . . . [¶] It flows further down the line from that. . . . [W]hen the attack is ongoing, [Salas] says, 'Get the fuck out of my way,' or something like that. That's because Diaz is preventing [Salas] from getting to his friend[]. When Diaz is engaging in that fight like that, he's aiding and abetting, as well."

D. *Amendment of Information and Verdict*

After the prosecution's case was presented, the court granted a defense motion to dismiss the charge of assault by means of force likely to create great bodily injury and amended the second count to misdemeanor battery. The jury found appellants guilty of

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[14] In opening statement, the prosecutor named Diaz as the shooter.

second degree murder and misdemeanor battery and found the gang and firearm allegations true.

E. *Motion for New Trial*

After the jury rendered its verdict, Diaz moved for a new trial. The motion was based in part on a "newly discovered" witness, Sandra Chavez.[15] Chavez was a friend of Maria Hernandez, Vega's former girlfriend and the mother of his child. After the trial ended, Chavez gave a statement to defense counsel's investigator in which she said she was at the party the night Pedroza and Salas were attacked. Chavez said that prior to the incident, she saw Betancourt show a gun to Vega. According to Chavez, Betancourt and another man attacked the two men in the alley while she, Diaz and Vega were standing together nearby.

Chavez also testified at the hearing on the motion for a new trial. At the hearing, she explained that at the party, she was introduced to Betancourt by Hernandez and Vega. During their conversation, Betancourt lifted up his shirt and showed her a gun stuck in his waistband. Later, Chavez was standing near the gate to the alley beside Vega and Diaz, whom she did not know. Chavez saw Betancourt and a male companion she knew only as "G" confront two men walking in the alley. She heard Vega say: "Dang, they shouldn't be here." Betancourt and his companion attacked the other men. Betancourt then shot one of them in the head.

Chavez learned that Vega had been arrested either two days or two months after the fact. She denied speaking to Hernandez very often after the shooting and said she had spoken to Hernandez about the case only a few times in total. Chavez claimed not to have talked to anyone else in the Hernandez family about the case. When confronted with cell phone records showing hundreds of calls to Hernandez's number, including

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[15] The motion was also based on prosecutorial misconduct.

one shortly before and one shortly after Chavez spoke with the defense investigator, Chavez said that she had called to talk to other family members, not Hernandez, and had not discussed the case.

The court denied the motion. The court found Chavez not credible because: none of the witnesses at trial placed Chavez in the alley at the time of the shooting; there were discrepancies in Chavez's testimony; Chavez's denial that she spoke with anyone other than Hernandez about the the case was "beyond belief"; and appellants had not told their attorneys of Chavez's existence and her ability to provide them an alibi. The court further stated: "I absolutely cannot accept [Chavez's] rationale that she would not know that the father of [Hernandez's] . . . baby, was sitting in jail months on end and going to trial and facing a life sentence. It is just beyond belief that she would not come forward . . . ."

F. *Sentence*

The court sentenced Diaz to a term of 40 years to life for count one (15 years to life, plus 25 years to life for the gun use enhancement) and a consecutive term of six months for count two.[16] The court imposed a $20 DNA penalty assessment, a $2,500 state court construction penalty assessment, a $20 court security assessment and a $5,000 restitution fine, and ordered Diaz to pay jointly and severally with Vega and Betancourt $5,000 to the state victim compensation board for victim restitution. A $5,000 parole restitution fine was imposed and stayed.

The court sentenced Vega to a term of 55 years to life for count one (15 years to life doubled for the "strike," plus 25 years to life for the gun use enhancement) and a consecutive term of six months on count two. The court imposed a $20 DNA penalty assessment, a $2,500 court construction fine, a $20 court security assessment and a

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[16] The gang enhancements were imposed and stayed for both appellants.

$5,000 restitution fine, and ordered Vega to pay jointly and severally with Diaz and Betancourt $5,000 to the state victim compensation board for victim restitution. A $5,000 parole restitution fine was imposed and stayed.

DISCUSSION

A. *Vega's Contentions*

1. *Natural and Probable Consequence*

Vega contends that murder was not a natural and probable consequence of the assault, which he describes as a "street fight." We believe that under the facts of the case, the death of Salas was a foreseeable result of the initial crime.

The natural and probable consequences doctrine comes into play when a defendant is charged with an offense (here, murder) based on his actions in aiding and abetting a different offense or offenses (here, assault, battery and breach of the peace). Under the natural and probable consequences doctrine, "the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged." (*People v. Villa* (1957) 156 Cal.App.2d 128, 134; accord, *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; *People v. Culuko* (2000) 78 Cal.App.4th 307, 322.) The doctrine thus "permits an aider and abettor to be found guilty of murder without malice." (*Id.* at p. 322.) Where two or more defendants commit an unlawful act from which death results and only one actually harbored malice, all may nevertheless be found guilty of murder as long as the death was a "natural and probable consequence" of the original act contemplated. (*Ibid*.) In other words, an aider and abettor can be found guilty of murder not only when he or she is aware that the principal intends to kill the victim, but also when he or she is aware that the principal intends to "engage[] in any other crime the foreseeable result of which might be murder." (*People v. Avila* (2006) 38 Cal.4th 491, 565.)

Whether a homicide is a natural and probable consequence of a gang fight where (1) the altercation began as a fistfight; (2) the defendant was not the direct perpetrator of the homicide; and (3) there was no evidence that the defendant was aware the perpetrator was armed with a deadly weapon has been the subject of only a handful of appellate opinions.[17] In two -- In *People v. Montes* (1999) 74 Cal.App.4th 1050 and *People v. Hoang* (2006) 145 Cal.App.4th 264 -- the courts found the murders or attempted murders were a natural and probable consequence of the altercations that preceded them. In *Montes*, the defendant had a history of animosity toward a particular member of a rival gang, having previously attacked him with a stick. On the day of the murder, the defendant and a group of his fellow gang members singled out the rival for attack. The defendant was using a lengthy chain. The defendant was found culpable of the attempted murder that resulted when a member of his group retrieved a gun from a nearby vehicle and shot the rival gang member several times. The court held that the predicate offenses of simple assault and breach of the peace supported the defendant's attempted murder conviction because the predicate offenses "arose in the context of an ongoing rivalry between [two gangs] during which the two gangs acted violently toward each other" and because "the confrontation was [from the beginning] punctuated by threats and weaponry." (*People v. Montes, supra*, 74 Cal.App.4th at p. 1055.)

In *People v. Hoang*, *supra*, 145 Cal.App.4th 264, the victim made offensive comments to the defendant's girlfriend and the defendant gathered a group of fellow gang members to attack the victim. During the course of the fight, one or more of the gang members stabbed the victim multiple times in the back. The defendant then followed the victim as he tried to escape and continued to taunt him. The court concluded that these facts were "sufficient to show defendant had knowledge of the

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[17] In *People v. Gonzales* (2001) 87 Cal.App.4th 1, cited by respondent to support the finding of foreseeability, substantial evidence supported that the defendant was aware the shooter had a gun when he ran toward the victim.

criminal purpose of the individual who actually stabbed [the victim], and acted with the intent or purpose to commit assault with deadly weapon or to encourage or facilitate that crime." (145 Cal.App.4th at p. 276.)

In *People v. Martinez* (2008) 169 Cal.App.4th 199, on the other hand, the court reversed a murder and attempted murder conviction based on the predicate offenses of breach of the peace and simple assault where three gang members asked a group of people where they were "from," and one of the three immediately pulled out a handgun and started shooting. The court concluded that the evidence "was not sufficient to allow a reasonable jury to find that a shooting or homicide was a natural and probable consequence of a 'Where are you from?' challenge under the circumstances of [the] case." (*Id.* at p. 214.)[18]

We believe substantial evidence supported the jury's finding that the murder of Salas was a natural and probable consequence of the assault, battery and breach of the peace that preceded it. This was not a random confrontation between rival gang members. The evidence supported that Diaz and Vega were intent on retaliating for the recent testimony that had resulted in the revocation of their friend Fletes's parole. Betancourt testified that Vega had vowed to get the "snitch" when he first heard of Fletes's situation. Pedroza testified that Vega had called him (Pedroza) a "rat" during a chance encounter a week prior to the shooting. Both Betancourt and Pedroza testified that Diaz identified Pedroza as a "rat" when he and Salas arrived at the party. When Pedroza and Salas attempted to leave, Vega and three companions chased them down and attacked them. These facts distinguish the instant case from *Martinez*, which began

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[18] In *People v. Medina* (2007) 153 Cal.App.4th 610, [63 Cal.Rptr.3d 203], review granted October 31, 2007, S155823, this court similarly reversed a conviction for murder and attempted murder where the question "where are you from?" led to a fistfight. The shooting there did not take place until after the fight had ceased and the victim was in his car driving away. The case is currently pending before the Supreme Court.

as a random encounter between apparent strangers, and more closely resemble the facts of *Montes* and *Hoang*, where the defendants knew and specifically targeted the victims, using fellow gang members to assist in meting out revenge. Moreover, just as the defendant in *Montes* armed himself with a deadly weapon before commencing the assault, the evidence was that Vega himself was armed with a handgun. He may or may not have been aware that Diaz had a gun, but Vega was himself ready to escalate to deadly violence at any time.

Vega contends that the death of Salas was the result of an intervening or superseding cause -- the actions of Diaz -- and that Diaz was acting "unreasonably." As the Supreme Court explained in *People v. Cervantes* (2001) 26 Cal.4th 860: "'[A]n "independent" intervening cause will absolve a defendant of criminal liability. (1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 131, p. 149.) However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." (*People v. Armitage* (1987) 194 Cal.App.3d 405, 420-421.)'" (*People v. Cervantes*, *supra*, 26 Cal.4th at p. 871, quoting *People v. Funes* (1994) 23 Cal.App.4th 1506, 1523.) On the other hand, "'"[i]f an intervening cause is a normal and reasonably foreseeable result of defendant's original act[,] the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' [Citation.]" (*People v. Harris* (1975) 52 Cal.App.3d 419, 427.)'" (*People v. Cervantes*, *supra*, 26 Cal.4th at p. 871, quoting *People v. Funes*, *supra*, 23 Cal.App.4th at p. 1523.)

Under the standard articulated in *Cervantes*, Diaz's actions cannot be viewed as an unforeseeable, superseding cause of Salas's death. Vega, armed and apparently

determined to punish Pedroza, whom he considered a "rat," enlisted three companions to assault Pedroza and his friend, Salas. In an altercation of half a dozen people, at least one of whom was armed, it was foreseeable that violence would escalate. It was equally foreseeable that Salas would come to the aid of his disabled companion and that one of Vega's fellow gang members would respond with escalating violence. As the prosecution's gang expert testified, gang members often react violently to being "disrespected." When Salas, attempting to help Pedroza, told Diaz to "get the fuck out of my way," Diaz's lethal response was hardly unforeseeable.

2. *Accomplice Testimony*

Section 1111 provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Vega contends that accomplice Betancourt's testimony against him was not sufficiently corroborated. We disagree.

"To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony." (*People v. Avila, supra,* 38 Cal.4th at pp. 562-563, quoting *People v. Perry* (1972) 7 Cal.3d 756, 769.) "Corroborative evidence, direct or circumstantial, is sufficient if it tends to connect defendant with the crime even though it is slight and entitled, when standing by itself, to but little consideration [citations], nor does it need to establish the precise facts testified to by the accomplice. It is sufficient if it tends to connect the accused with the commission of the offense . . . ." (*People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012; accord, *In re B.D.* (2007) 156 Cal.App.4th 975, 984-985.) "'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact

which is an element of the crime but it is not necessary that [such] evidence be sufficient in itself to establish every element of the offense charged." [Citation.]' [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 467, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Here, independent evidence corroborated Betancourt's testimony as required by section 1111. Pedroza testified that he and Salas were confronted by Betancourt; that Betancourt struck him (Pedroza) after Diaz called him a "rat"; that immediately after Betancourt struck, Vega began his assault; that as Salas attempted to defend his companion, Diaz shot him. While Vega emphasizes discrepancies between Betancourt's testimony and Pedroza's, there is no requirement that accomplice testimony and corroborating evidence be identical in all respects. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022.) It is sufficient that the independent evidence relates to some act or fact which is an element of the crime and establishes the defendant's connection to it. Pedroza's testimony did just that. Though Pedroza did not see the gun, he did see Diaz come forward and extend his arm toward Salas, after which he heard a gunshot. This was sufficient to permit the jury to infer Diaz shot Salas. Additionally, cellular phone records showing calls between appellants following the shooting further connected them to the crimes. In short, Betancourt's testimony was sufficiently corroborated by other, independent evidence to meet the requirements of section 1111.[19]

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[19] Because we conclude Betancourt's testimony was corroborated within the meaning of section 1111 as a matter of law, Vega's related contention that the prosecutor committed misconduct by arguing that Pedroza "corroborated" Betancourt has no merit.

B. *Diaz's Contentions*

1. *Instruction on Withdrawal*

Diaz contends the trial court erred by failing to give, sua sponte, an instruction on the withdrawal defense available to an aider and abettor.[20] He contends the evidence supported a finding that he withdrew from participation in the predicate crime before the target offense of homicide was committed.

"It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. [Citations.] The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Diaz points out that although the prosecution's primary theory at trial was that Diaz was the shooter, in rebuttal the prosecutor argued that the jury could convict Diaz of murder as an aider and abettor of whoever fired the shot. Diaz contends the evidence that he called out "leave them alone" after Betancourt said "let's fuck this fool" supports the defense that he withdrew from participation before the murder was committed. We disagree.

"[I]n a case involving general liability as an aider and abettor for the originally contemplated crime, a defendant will not be liable for the contemplated crime despite the fact that he aided, promoted, encouraged, or instigated the commission of the crime

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[20] See, e.g., CALJIC No. 3.03: "Before the commission of the crime[s] charged in Count[s] _____, an aider and abettor may withdraw from participation in [that] [those] crime[s], and thus avoid responsibility for [that] [those] crime[s] by doing two things: First, [he] [she] must notify the other principals known to [him] [her] of [his] [her] intention to withdraw from the commission of [that] [those] crime[s]; second, [he] [she] must do everything in [his] [her] power to prevent its commission."

with the intent that it be committed, if he effectively withdraws from participation in the crime before it is committed." (*People v. Fiu* (2008) 165 Cal.App.4th 360, 384.) "To be entitled to an instruction on the withdrawal defense, a defendant charged with aiding and abetting a crime must produce substantial evidence showing that (1) he notified the other principals known to him of his intention to withdraw from the commission of the intended crime or crimes, and (2) he did everything in his power to prevent the crime or crimes from being committed." (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055.)

Diaz's statement may have minimally satisfied the first prong of the test -- notification of intent to withdraw -- but not the second. There was no evidence that Diaz did anything to prevent the beating of Pedroza and Salas once it started, much less "everything in his power." Diaz claims that by instructing Betancourt to leave Pedroza alone, he did what was reasonably within his power to prevent the assault, because as a veteran gang member, he would expect the younger man to obey. The evidence demonstrated, however, that Pedroza and Salas were attacked by multiple gang members, including Vega, who was not a newcomer and therefore not susceptible to a verbal admonition from Diaz. Moreover, even were we to disregard the clear evidence that Diaz was the shooter, the evidence demonstrated Diaz continued to aid and abet the battery by his presence at the gate and by physically blocking Salas from protecting Pedroza. (See *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743-744, quoting *People v. Masters* (1963) 219 Cal.App.2d 672, 680 ["'[O]ne who is present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of anyone seeking to interfere, . . . is a principal in the crime committed. [Citations.]'"]; *People v. Cayer* (1951) 102 Cal.App.2d 643, 651 [defendant aided and abetted fight that led to victim's death by, among other things, threatening bystanders to prevent them from stepping in to stop it]; *People v. Le Grant* (1946) 76 Cal.App.2d 148, 154, disapproved on another ground in *People v. Cox* (2000) 23 Cal.4th 665, [defendant

"gave active aide, encouragement and assistance" to attacker because "with full knowledge that an assault and battery was in progress," he "ke[pt] other people back who might have 'butted in' and have thus prevented the tragedy" of victim's death].) On the evidence presented, the defense of withdrawal was not supported by substantial evidence and the trial court was not, therefore, obliged to give the withdrawal instruction.

2. *Motion for New Trial*

Diaz contends the court abused its discretion when it denied the defense motion for a new trial. There was no abuse.

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328, quoting *People v. Sutton* (1887) 73 Cal. 243, 247-248.) "[T]he trial court may consider the credibility as well as materiality of the evidence in its determination whether introduction of the evidence in a new trial would render a different result reasonably probable." (*People v. Beyea* (1974) 38 Cal.App.3d 176, 202; accord, *People v. Delgado*, *supra*, at p. 329.)

The parties agree that the determination whether to grant a motion for new trial rests within the trial court's discretion and is reviewed on appeal under a deferential standard. (See, e.g., *People v. Delgado*, *supra*, 5 Cal.4th at p. 328, quoting *People v. Williams* (1988) 45 Cal.3d 1268, 1318 ["'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'"].)

First, we note that Chavez cannot be considered a newly discovered witness because, according to her testimony, she was standing next to Diaz and Vega during the attack on Pedroza and Salas and therefore her existence and ability to provide evidence favorable to the defense should have been known to both appellants. (*People v. Greenwood* (1957) 47 Cal.2d 819, 822 ["Facts that are within the knowledge of the defendant at the time of trial are not newly discovered even though he did not make them known to his counsel until later."].) Diaz contends he did not know the identity of Chavez who, according to her testimony, was acquainted with Vega, but not Diaz. However, her identity could easily have been ascertained had Diaz informed his attorney of the version of events related by Chavez.

Further, the trial court's finding that Chavez was not credible was amply supported. Chavez gave no good reason for not coming forward earlier, when she had been aware for several years that her good friend's boyfriend was in prison. She claimed on direct that she rarely spoke with Hernandez after the shooting; her sworn testimony was undermined by the cell phone records produced on cross-examination showing hundreds of calls to Hernandez's number. Her statement that she rarely spoke to Hernandez about the case and to no one else in Hernandez's family about it was undermined by the evidence that she called Hernandez's telephone number immediately before and after speaking with the defense investigator. Moreover, as the trial court pointed out, none of the trial witnesses supported her claim to have been in the vicinity of the attack at the crucial time. In view of these factors, the trial court's decision to deny the motion was not an abuse of discretion.

3. *State Court Construction Penalty and DNA Penalty*

To fund a DNA testing program, Government Code section 76104.6, subdivision (a) permits the court to assess "an additional penalty of one dollar for every ten dollars ($10), or fraction thereof . . . upon every fine, penalty, or forfeiture imposed and

collected by the courts for all criminal offenses . . . ." Diaz contends the $20 DNA penalty imposed by the court was improperly assessed. Respondent concedes that as the trial court "did not explain how it calculated the DNA penalty assessment" and "there was no fine or penalty imposed in the amount of $200 which would have supported a $20 calculation for a DNA penalty assessment," the penalty assessments cannot stand.

For purposes of state court construction, Government Code section 70372 permits an assessment "in the amount of five dollars ($5) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ." However, the assessment may not be based on "[a]ny restitution fine." (Gov. Code, § 70372, subd. (a)(3)(A).) Diaz contends and respondent concedes that the trial court improperly imposed a $2,500 state court construction penalty, which due to its amount, could only have been based on the restitution fines.

Respondent contends that the improperly assessed penalties should be stricken as to appellant Diaz only. We disagree. (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1369 [imposition of fine in amount not authorized by statute equivalent to an unauthorized sentence].) As the unauthorized penalties were assessed against both appellants, they must be set aside as to both.

DISPOSITION

The judgments are modified by striking the $20 DNA penalty and the $2,500 state court construction penalty imposed on both appellants. The clerk of the superior court is directed upon issuance of the remittitur to prepare corrected abstracts of judgment as set forth in this opinion and to forward them to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.